JUN 7 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 143

DANIEL M. CORY and MARGOT CORY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

Opinions Below

The opinion of the Tax Court is reported in 23 T. C. 775. The opinion of the Court of Appeals (36a-44a)[1] is reported in 56-5 CCH ¶9361.

---

[1] (All undesignated references are to pages of petitioners' Appendix.)

Jurisdiction

The judgment of the Court of Appeals was entered on March 9, 1956 (45a). The jurisdiction of this Court is invoked under §240A of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The sole question presented is whether the copyright agreement between petitioner Daniel M. Cory (hereinafter called Cory) and Scribner's for the publication of George Santayana's autobiography was an assignment or sale as claimed by Cory so that its proceeds were capital gains, or merely a license as claimed by the respondent.

Statement

Cory was a citizen and resident of the United States throughout the whole relevant period. He had for many years been secretary to Dr. George Santayana, a nonresident alien, who made a gift to him of a manuscript written by Santayana. Cory made the following contract regarding the book with Charles Scribner's Sons (hereinafter called Scribner's) on November 10, 1942:

> "MEMORANDUM OF AGREEMENT made this tenth day of November 1942 between DANIEL M. CORY of New York City, N. Y., hereinafter called "the Proprietor" and CHARLES SCRIBNER'S SONS, of New York City, N. Y., hereinafter called "the PUBLISHERS." Said Daniel M.

Cory being the PROPRIETOR of a work tentatively entitled:

PERSONS AND PLACES: Fragments of Autobiography (to be in either two or three volumes)

in consideration of the covenants and stipulations hereinafter contained, and agreed to be performed by the PUBLISHERS, grants and guarantees to said PUBLISHERS and their successors the exclusive right to publish the said work in all forms in the United States and Canada during the terms of copyright and renewals thereof, hereby covenanting with said PUBLISHERS that he is the sole PROPRIETOR of said work.

Said Proprietor hereby authorizes said PUBLISHERS to take out the copyright on said work, and further guarantees to said PUBLISHERS that the said work is in no way whatever a violation of any copyright belonging to any other party, and that it contains nothing of a scandalous or libelous character; and that he and his legal representatives shall and will hold harmless the said PUBLISHERS from all suits, and all manner of claims and proceedings which may be taken on the ground that said work is such violation or contains anything scandalous or libelous; and he further hereby authorizes said PUBLISHERS to defend at law any and all suits and proceedings which may be taken or had against them for infringement of any other copyright or for libel, scandal, or any other injurious or hurtful matter or thing contained in or alleged or claimed to be contained in or caused by said work, and pay to said PUBLISHERS such reasonable costs, disbursements, expenses, and counsel fees as they may incur in such defense.

Said PUBLISHERS, in consideration of the right herein granted and of the guarantees aforesaid, agree to publish said work at their own expense, in such style and manner as they shall deem most expedient, and to pay said Proprietor or his legal representatives, TEN (10) per cent on their Trade-List, retail, price for the first five thousand (5000) copies of said work sold by them, and FIFTEEN (15) per cent for all copies sold thereafter, except as hereinafter provided. Provided, nevertheless, that one-half the above named royalty shall be paid on all copies sold outside of the United States; and provided that no percentage whatever shall be paid on any copies destroyed by fire or water, or sold at or below cost, or given away for the purpose of aiding the sale of said work.

It is further agreed that the profits arising from any publication of said work, during the period covered by this agreement, in other than book form shall be divided equally between said PUBLISHERS and said Proprietor.

Expenses incurred for alterations in type or plates, exceeding twenty percent of the cost of composition and electrotyping said work, are to be charged to the Proprietor's account.

The first statement shall not be rendered until six months after date of publication; and thereafter statements shall be rendered semi-annually, on the Proprietor's application therefor, in the months of February and August; settlements to be made in cash, four months after date of statement.

If, on the expiration of FIVE years from date of publication, or at any time thereafter, the demand for said work should not, in the opinion

of said PUBLISHERS, be sufficient to render its publication profitable, then, upon written notice by said PUBLISHERS to said Proprietor this contract shall cease and determine; and thereupon said Proprietor shall have the right, at his option, to take from said PUBLISHERS, at cost, whatever copies of said work they may then have on hand; or, failing to take said copies at cost, then said PUBLISHERS shall have the right to dispose of the copies on hand as they may see fit, free from any percentage or royalty, and to cancel this contract.

Provided, also, that if, at any time during the continuance of this agreement, said work shall become unsalable in the ordinary channels of trade, said PUBLISHERS shall have the right to dispose of any copies on hand paying to said Proprietor fifteen (15) per cent. of the net amount received therefor, in lieu of the percentage hereinbefore prescribed.

If after two years from the date of publication the sale of said work falls below a total of five hundred (500) copies in any year, the royalty shall revert to TEN (10) per cent for the sales that year.

In consideration of the mutuality of this contract, the aforesaid parties agree to all its provisions, and in testimony thereof affix their signatures and seals.

Witness to signature of
Charles Scribners' Sons
FIDELIA E. STARK

CHARLES SCRIBNERS' SONS
CHARLES SCRIBNER
President (SEAL)

Witness to signature of
Daniel M Cory
EDMUND C. WALL"

DANIEL M. CORY (SEAL)

The book was sold to the Book-of-the-Month Club by Scribner's and in 1944 the payments made into escrow (an arrangement required by the conflicting claims of Santayana's half-nephew) by Scribner's aggregated $42,363.57, of which taxpayer's one-half share of the payments from the Book-of-the-Month Club amounted to $31,300. For reasons set forth in the Tax Court's opinion, not relevant to this petition, only $12,000. of these proceeds were paid to Cory in 1944.

The Tax Court found as a fact that Cory's earnings from all his own writings "have been relatively insignificant in amount" (13a), and from its opinion it is clear that the Court considered the literary work in question a capital asset. However, the Court held that the transaction was merely a license, thus giving rise to ordinary income.

The Second Circuit Court of Appeals affirmed (37a-45a).

Specification of Error to Be Urged

The Court of Appeals erred in finding that the publication contract did not constitute an assignment of the copyright.

Reasons for Granting the Writ

Both the Tax Court and the Court of Appeals based their ruling against Cory on the fact that his compensation for assigning his copyright to Scribner's was contingent on future sales. The Tax Court seemed to overlook the distinction implicit in the

majority opinion in *Comm.* v. *Wodehouse,* 337 U. S. 369, between the taxability of "sales" of interests in copyrights by non-resident aliens and by United States citizens.

The Court of Appeals expressed its appreciation of the distinction, stating that "here we must consider such 'fine questions' "—such as " 'questions of title, or of sales or copyright law, * * * as to the divisibility of a copyright, or as to the sale of some interest in a copyright,' " (quoted from the majority opinion in the *Wodehouse* case, 337 U. S. 376). But we respectfully submit that the learned Court of Appeals erred in its decision of this question, which in this case seems to involve little difficulty, because the transfer is so clearly expressed in the unambiguous written contract as being the right to publish "in all forms"—later explained with if possible even more crystal clarity as meaning both "in book form" and "in other than book form"—the assignment thus covering the whole "bundle of rights" listed in Sec. 1(a) of the United States Copyright Law, which is set forth in *Comm.* v. *Wodehouse, supra,* at p. 421.

The main authority cited by the Court of Appeals is Mr. Justice Frankfurter's dissenting opinion in the *Wodehouse* case,—or rather of one sentence from that opinion, which the Court of Appeals paraphrased as follows:

> "He maintained that the crucial test of sale was not whether the transfer included the entire bundle of rights but whether there had been a transfer 'absolutely' of a 'distinct right * * * conferred by the Copyright Law' under 'terms of payment which do not depend on the future use by the transferee.' "

That sentence, we believe, was directed to two factors there important (Wodehouse being then an alien), but here wholly irrelevant: first, the requirement that only *periodical* income is taxable to an alien; and second, that only income arising from the use of a copyright in the United States is so taxable. In that case, Wodehouse concededly had retained a substantial part of the whole bundle of rights specified in Sec. 1(a) of the Copyright Law, and had his partial transfer of the first serial rights been on a purely *royalty* basis, contingent on future sales within the United States, he would have evidently been taxable. Here there is no such problem.

The Court below (unlike the Tax Court) based its decision partly on the retention by Cory of the foreign rights and the United States movie and dramatic rights; and the fact that Scribner's (after selling the book to the Book-of-the-Month Club for over $60,000., half of which with the normal book royalties had to be held in escrow for the most part till 1945) permitted Cory to keep the whole of $1,000. which he was paid by the Atlantic Monthly in 1943, instead of claiming half of it. But surely the retention of the foreign rights has no bearing on the sale of the American ones; and Scribner's generosity as to the $500. payment in 1943 seems inconsequential.

In substance, the decision below stands for the proposition that the main, if not the sole criterion in deciding whether any interest in a copyright has been sold or licensed, is whether the compensation is contingent on future sales. We submit that the proper criterion is, who owns the copyright after the transaction, and that whether the consideration is paid in one lump sum, in installments, or as a per-

centage of sales, is immaterial in the case of an American citizen who has assigned all, or substantially all of his rights in one of the separate categories listed in Sec. 1 of the Copyright Law.

The whole reasoning of Mr. Justice Frankfurter's dissenting opinion was exactly the reverse of the opinion below, as was that of the Fulda article in 58 Yale L. J. 245, cited in both opinions. The present holding is directly *contra* to *Herwig* v. *United States* (Ct. Cls.) 105 F. S. 384, where the statement of facts shows that part of the consideration paid for the motion picture rights was contingent; the consideration was also partly contingent in *Fields* v. *Comm.* (C. A. 2) 189 F. 2d 950. Both *Herwig* and *Fields* are cited below.

The decision below is also in conflict with the following decisions of Circuit Courts of Appeals in the closely analogous case of transfer of patent rights on a royalty basis:

Hopkinson v. *Commissioner* (C. A. 2) 126 F. 2d 406;
Comm. v. *Celanese Corp. of America* (D. C. App.) 140 F. 2d 235;
Hofferberg v. *Briggs* (C. A. 4) 178 F. 2d 743;
Kavanagh v. *Evans* (C. A. 6) 188 F. 2d 21;
Allen v. *Werner* (C. A. 5) 190 F. 2d 840;
United States v. *Carruthers* (C. A. 9) 219 F. 2d 21;
Watson v. *United States* (C. A. 10) 222 F. 2d 689;
Massey v. *United States* (C. A. 5) 226 F. 2d 724.

Watson v. *United States, supra,* states the rule briefly as follows (at p. 691):

> "The agreement contained a provision for payment of royalties. That provision merely fixed the compensation to be paid as consideration for the transfer. It did not reserve to Watson any control over the patent or its use. It did not limit or qualify the scope of the grant. And since the agreement contained language vesting in the corporation the exclusive right to manufacture, sell, and use carts throughout the United States, the provision for payment of royalties did not change the nature of the transfer to a license."

Incidentally, the opinion below assumed that the Tax Court found a deficiency of $13,770.50, whereas it actually found an overpayment of $4,559.40. However, since respondent did not appeal from the Tax Court's decision and the Court of Appeals affirmed it, this was presumably a harmless inadvertence.

If the opinion below is correct, the Government has been losing large amounts of tax properly due in other Circuits than the Second. If it is erroneous, as we claim, taxpayers in the Second Circuit have been unjustly mulcted. We urge that this important question of Federal law, on which there is such a sharp conflict between the Second Circuit and nearly all the rest, should be reviewed by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WATSON WASHBURN
Counsel for Petitioners

WASHBURN & GRAY
Of Counsel

June 6th, 1956.

No. [redacted] 143

JUN 7 1956
HAROLD B. WILLEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL M. CORY and MARGOT CORY, his wife,
Petitioners-on-Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-on-Review.

On Petition to Review the Decision of The Tax Court of the United States

APPENDIX OF PETITIONERS-ON-REVIEW

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SECOND CIRCUIT

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APPENDIX

[A]

THE TAX COURT OF THE UNITED STATES

Docket No. 37209

DANIEL M. CORY and MARGOT CORY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES:

For Petitioners: WATSON WASHBURN, Esq.

For Respondent: MAURICE E. STARK, Esq.

4/ 1/54—Assigned to Judge Baar, Div. 2.

10/19/54—Assigned to Judge Turner, Div. 8.

Docket Entries

1951

Oct. 16—Petition received and filed. Taxpayer notified. Fee paid.

" 18—Copy of petition served on General Counsel.

" 16—Request for Circuit hearing in New York City filed by taxpayer. 10/23/51—Granted.

Dec. 7—Answer filed by Respondent.

" 13—Copy of answer served on taxpayer, New York, N. Y.

Docket Entries

1952

Sept. 22—Hearing set November 17, 1952, New York, N. Y.

Oct. 22—Motion for continuance to a calendar following April 15/53, filed by taxpayer. 10/30/52—Granted.

1953

Feb. 25—Hearing set May 11, 1953, New York, N. Y.

May 11—Hearing had before Judge Hill on the merits on Petitioner's motion to file amendment to petition and on Respondent's motion to file answer, Granted and copies served. Amendment to petition and answer to amendment filed at hearing. Briefs due 6/25/53; Replies due 7/10/53.

" 28—Transcript of Hearing 5/11/53 filed.

June 18—Stipulation to correct transcript filed.

" 22—Brief filed by taxpayer.

" 24—Motion for extension of time to 7/10/53 to file brief filed by General Counsel. 6/25/53—Granted.

July 10—Brief filed by General Counsel. Served 7/13/53.

" 13—Copy of Brief served on General Counsel.

" 28—Reply Brief filed by taxpayer. Copy served 7/28/53.

[B]

1955

Jan. 31—Findings of Fact and Opinion filed, Judge Turner, Decision will be entered under Rule 50. Copy served 1/31/55.

Docket Entries

May 19—Agreed computation for entry of decision filed.
" 20—Decision entered, Judge Turner, Div. 8.

June 6—Agreed motion to vacate decision of 5/20/55 and for an order pursuant to the agreed computation of 5/19/55, filed.
" 17—Order and decision entered, Judge Turner, Div. 8.

Aug. 1—Petition for Review by U. S. Court of Appeals for the Second Circuit with assignments of error filed by taxpayer.
" 1—Proof of Service filed.

Excerpts from Official Report of Proceedings

[SAME TITLE]

[1] 5050 Grand Central Terminal Bldg.
70 East 45th Street
New York, N. Y.
Monday, May 11, 1953.

Met, pursuant to notice, at 11:00 o'clock a. m.

Before—Hon. Samuel B. Hill, *Judge*.

Appearances:

Watson Washburn, Esq.,
36 West 44th Street,
New York, N. Y.
Appearing for Petitioner.

Maurice A. Stark, Esq.,
2300 Empire State Bldg.,
New York, N. Y.,
Appearing for Respondent.

---

[14] Whereupon,

John Hall Wheelock

called as a witness on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

* * * *

[29] Cross Examination

By Mr. Stark:

[30] Q. Mr. Wheelock, how long did you say you had been employed by Charles Scribner's Sons as of the cal-

endar year 1944? A. Well, since 1911. Since April, 1911.

Q. Have you had occasion in the line of your work to become acquainted with the memorandum of agreement which is Petitioner's Exhibit 2 in this case? A. Yes. This is a copy of the contract.

Q. My question was, are you acquainted with this type of contract? A. Yes.

Q. Were you well acquainted with this type of contract? A. Yes, yes.

Q. Can you state to the Court what the payments were known as resulting from the type contract such as Petitioner's Exhibit 2 in this case?

> Mr. Washburn: I object to that, your Honor, as calling for a legal conclusion from the witness.
>
> Mr. Stark: If the Court please, the witness has indicated he is familiar through many years' experience with this type of document. I am only asking for his conclusion as to what those payments were known as in his business.
>
> The Court: You can ask what they are known as.
>
> Mr. Stark: Yes, your Honor, that is my question.

By Mr. Stark:

[31] Q. What were these payments known as? A. They are referred to usually as royalties.

Q. I hand you again Petitioner's Exhibit 2. Will you indicate to the Court whether or not that contract was dispositive of the entire rights of the manuscript indicated as the subject matter of said Exhibit 2? A. This contract would dispose of all the book rights in the United States and Canada. It would not include motion picture,

dramatic rights; it would include second serial rights but not first serial rights.

Q. Would you indicate whether or not that contract was terminable? I mean by that, were there provisions therein indicating that upon certain conditions that contract would cease to exist as between the parties?

The Court: Doesn't the contract present the best evidence on that point?

Mr. Stark: Yes, your Honor. I thought I would get the opinion of a man versed in contract law, but if your Honor wants to make a decision on that, that will be all right.

The Court: He is not a legal advisor to this concern.

Mr. Stark: No, your Honor. I will withdraw that question if your Honor requests.

* * * *

[35] Re-direct Examination

By Mr. Washburn:

* * * *

[36] Q. Mr. Wheelock, you testified on cross examination that your contract with Mr. Cory gave you only book rights and second serial rights? A. Yes.

Q. But I call your attention to the fact that the form of contract which is in evidence as Exhibit 2 has the word "book" stricken out; that is, in the phrase "In book form" the word "book" which is printed is stricken out and the word "all" is typed over it; whereas in the original contract the printed form itself calls for the right to publish said work in all forms. Does that signify anything in your mind? A. Well, that is qualified by the

stipulation "all forms in the United States and Canada," which would exclude [37] publication in foreign languages of other countries, would exclude publication in English in England, and I think the word "publish" could be said to exclude motion pictures and plays, production of a play, which would not be a publication.

Q. Would you say now that the wording of this revised printed form of contract giving Scribner's the right to publication in all forms does give Scribner's the legal right to publish in every kind of printed form? A. I really don't know just what the meaning for that change is right there. That is the form in which the printed contract reads, and this is a conformed copy, is it not, signed by Mr. Scribner and Cory or is this the original?

Q. This is the duplicate original. A. Duplicate original.

Q. Which has printed on it— A. In which the word "in all forms"—phrase "in all forms" occurs.

Q. The phrase "in all forms", whereas the copy which has been introduced in evidence, is copied obviously on another kind of printed form but conformed. A. Yes. I don't know just how to explain that. I do know this was the printed form used for our contracts at that time and that those contracts never include motion [38] picture rights, dramatic rights, television rights, and foreign language rights unless those are specifically provided for in the contract. And the term "in the United States and Canada"—sometimes in a contract you get world rights, in which case you have the other language rights, but the dramatic, motion picture and television rights are always vested in the author and not in the publisher. The only thing he has are the second serial rights.

Q. But you would say under the form of contract actually made with Mr. Cory Scribner's had complete rights to everything in the form of printed words?

Mr. Stark: If your Honor please, the witness just indicated, I think, as to the extent of Scribner's right therein.

Mr. Washburn: He has excluded a lot of things which are not printed words. I wanted him to confirm this covers all printed words, if that is the fact.

The Court: In the United States and Canada?

Mr. Washburn: In the United States and Canada.

The Witness: The only thing, then, if that were interpreted on the basis of all forms, the only thing that could be excluded that I could see would be second serial rights. But I have never known of a case where second serial rights did not belong to the publisher. First serial rights never do. I mean that phrase does not change the situation [39] very much, does it? "United States and Canada in all forms" would mean just what you have anyway.

By Mr. Washburn:

Q. Mr. Wheelock, in the case of this "Persons and Places" were the major part of the proceeds received from the Book of the Month Club? A. Yes.

Q. Were those proceeds divided—that is, the gross proceeds of it divided equally between Mr. Cory and Scribner's? A. Yes.

Q. Under what provision of the contract was that equal division made? A. It is under the final paragraph on page 1. "It is further agreed that the profits arising from any publication of said work during the period covered by this agreement other than book form shall be divided equally between said publishers and said proprietor." That covers anthologies, quotations, permissions, and Book of the Month Club and other book club issues.

Q. Would you say that the proceeds here, then, which

were equally divided from the Book of the Month Club would be called profits rather than royalties? A. Yes, I would think so.

• • • •

[40] Re-cross Examination

By Mr. Stark:

• • • •

Q. I hand you again Petitioner's Exhibit 2, being a conformed copy of the original agreement between Daniel Cory and Scribner's, and in reference to the questions by counsel for the petitioner as to the word "all", will you state whether or not on the first page of the original agreement that word appears in printed form and typed form not struck over? A. Yes, it appears in printed form and not struck over.

Q. Will you state whether or not on the conformed copy, which is Petitioner's Exhibit 2 herein, the word "all" has [41] been inserted by a typewriter? A. That is right.

Q. Will you state further that the insertion of the word "all" by typewriter on Petitioner's Exhibit 2 was to conform that form with the original form used in the agreement between the parties? A. I assume that is the reason it was done, yes.

• • • •

[46] Whereupon,

DANIEL M. CORY

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows

* * * *

[47] DIRECT EXAMINATION

By Mr. Washburn:

* * * *

[50] Q. Did you one year sell certain chapters of Mr. Santayana's book to the Atlantic Monthly? A. Yes. Three chapters, if I remember, three chapters of the first autobiography were serialized in the Atlantic Monthly.

Q. How much did you receive for that from the Atlantic Monthly? A. $1000.

Q. Was that in the year 1943? A. I think so, yes.

* * * *

Findings of Fact and Opinion

[267]

23 T. C. 775

[SAME TITLE]

Docket No. 37209. Filed January 31, 1955.

George Santayana, author of the literary work "Persons and Places," caused the manuscript of that work to be delivered to petitioner, and petitioner, on November 10, 1942, as "Proprietor" of the said work, entered into an agreement for its publication with Charles Scribner's Sons. The respondent determined that Santayana made a gift of his entire interest in "Persons and Places" to petitioner and that the proceeds payable by Scribner's to petitioner by reason of its publication of the work were taxable to petitioner as ordinary income. On the facts, *held*, that (1) Santayana had made a gift of his entire interest in "Persons and Places" to petitioner prior to November 10, 1942; (2) the agreement by petitioner and Scribner's was not a sale by petitioner of a property interest in "Persons and Places" to Scribner's, or of his rights with respect thereto; and (3) the amount of income realized and received by petitioner in 1944, the taxable year herein, was $12,000.

[268] Watson Washburn, Esq., for the petitioners.

Maurice A. Stark, Esq., for the respondent.

The respondent determined a deficiency in income tax against the petitioners for the taxable year 1944 in the amount of $13,770.50. The petitioners claim an overpayment of income taxes for that year in the amount of $7,699.06. The only issues presented for our decision are

whether the amount of $42,057.66 derived from the publication of the book "Persons and Places," or a part thereof, is taxable income of the petitioners for the year 1944 and, if so, whether as capital gain, as reported by the petitioners, or as ordinary income, as contended by the respondent.

Findings of Fact

The petitioners are husband and wife, and are citizens of the United States presently residing in England. They filed their joint income tax return for the calendar year 1944 with the collector of internal revenue for the third district of New York.

Daniel M. Cory, hereinafter referred to as the petitioner, has been occupied since the age of nineteen as a scholar in philosophy. He was a close friend and disciple of the well-known philosopher and writer George Santayana, who died in Rome on September 26, 1952. Santayana was a Spanish National, who, throughout the period here in question, resided in Italy.

Santayana, who expressed an interest in the petitioner's future, thought that the petitioner showed a great deal of talent in philosophy and made efforts to encourage him in the pursuit of it. From 1927 to 1940 the petitioner spent from four to five months of each year with Santayana. During these years Santayana made a practice of giving the petitioner [269] various amounts as an allowance and for the payment of his living and traveling expenses.

The petitioner has written a great many essays on philosophy and epistemology which have been published in magazines devoted to those subjects, but, in accordance with the usual practice of scholars in those fields, the petitioner has received no remuneration for such articles. In the course of his life, the petitioner has published sev-

eral poems and book reviews and has published two articles in the Atlantic Monthly. Petitioner's earnings from these and all other of his writings have been relatively insignificant in amount.

In 1940, on the advice of Santayana, the petitioner and his wife came to the United States from Switzerland, and remained in the United States until the end of 1944. Santayana attempted to defray a part of the petitioners' traveling expenses with a draft of £100, which could not be cashed because the funds on which it was drawn were frozen as a result of the war.

During his stay in this country, the petitioner attended and gave various lectures. He also conducted discussion groups in the department of philosophy at Columbia University. He earned no money from 1940 to 1944 except a few dollars from a poem and $300 for an article on Santayana published in the Atlantic Monthly. Throughout this period the petitioner was experiencing financial difficulties and was in need of money to support his wife and himself.

On June 26, 1940, Santayana, who continued to reside in Italy, wrote to the petitioner stating that the only thing that he could do financially [270] for the petitioner was to send him checks drawn on a British bank. Because of war restrictions it was impossible for the petitioner to cash such checks. On October 21, 1940, Santayana wrote to Charles Scribner's Sons requesting them to pay to the petitioner the amount due to Santayana for royalties on December 1, 1940, and such further royalties as might later become due to Santayana until normal communications with Italy were restored. Pursuant to these instructions Scribner's paid the following amounts to the petitioner: 1940, $1,894.67; 1941, $1,245.67; 1942, $906.98; 1943, $694.13.

As early as 1936 or 1937, petitioner had been told by Santayana that he would be given Santayana's autobiog-

raphy and all other of his writings unpublished as of the date of his death. In his will executed April 25, 1938, Santayana provided that all of his books, manuscripts and personal effects should go to the petitioner. By August 2, 1938, Santayana was at work on his autobiography, which he had tentatively entitled "Persons and Places: Fragments of Autobiography." This autobiography was ultimately published in three volumes: "Persons and Places," "The Middle Span" and "My Host the World." The first volume, "Persons and Places," which was completed by October 12, 1941, is the only one with which this proceeding is concerned.

On April 30, 1941, Santayana wrote to John Hall Wheelock, the Scribner's representative with whom he usually dealt, as follows:

> Now that I am almost entirely well again, I am returning to the *Autobiography* with new zest.
>
> I will send you the *Introduction* at once, and it does not matter how long you decide to put off the publication.

[271] Again, on August 22, 1941, Santayana wrote Wheelock:

> In your kind letter of July 30 you say your firm is disposed to advance the payment of my royalties to Cory, if he should ever need such assistance. I am very glad to know this; because I feel partly responsible for having kept him out of steady employment during the best years of his life. My late friend Strong was also responsible and acted accordingly, as you know. It happens to be difficult for me for family reasons to leave Cory any legacy or to help him out of the money in charge of my nephew George Sturgis, which is largely Sturgis money in origin. But I feel free to dis-

pose of my earnings, including my royalties: and for this reason (as I don't need them) I have asked you to let him have them during this war, when my private bank account in London is congealed. In case of my death, however, he might be in at least momentary difficulties; and I am not sure that my royalties could then legally go to him. For this reason I mean to give him my MSS including that of my autobiography, and am expressly leaving them to him in my Will. He will then make the contract for publication with you, and have a right to the royalties.

On September 18, 1941, Santayana wrote to the petitioner, stating that 16 chapters of his autobiography were finished and promising to send the petitioner a carbon copy of the 16 chapters then completed, if possible, from Italy or from Spain. Again, on October 12, 1941, Santayana wrote to the petitioner, saying:

> Now as to your troubles and disappointments, I am extremely sorry. I am sending you today the carbon copy of *Persons & Places,* 280 odd pages, and you can have it published serially in some magazine, as Wheelock suggests, so as to get some return almost at once. I am writing to him about this, and won't repeat what I tell him, as you compare notes. Get my royalties, due on Dec. 1, earlier, as soon as you need them, and I will ask George Sturgis to send you a Christmas present, since I am as superflously [sic] rich in America as I am inconveniently poor in Italy. * * *

On the same date, October 12, 1941, Santayana also wrote to Wheelock as follows:

> [272] Before moving I mean to send Cory the MS of my Persons & Places, the carbon copy. I

> approve of your suggestion that it should first appear serially: it had occurred to me many years ago that such a thing might be possible. Arrange everything between you, without consulting me, as if I were already dead. I don't think there is much, or indeed anything more, to cut out, as I have already removed what seemed to be *dangerous*: but cut out anything that you think *tedious* or *unnecessary*. I keep the original in reserve, for the future.

On October 17, 1941, Santayana wrote petitioner to the effect that the manuscript had been returned to him by the postal authorities and that because of postal regulations imposed by the Italian authorities as the result of the war it was impossible to mail the manuscript of "Persons and Places," and further saying that he was distressed at having this means of helping the petitioner cut off, and promising to do what was possible to tide the petitioner over. In addition to promising the petitioner a Christmas present, Santayana stated that perhaps it would be possible to shift to the petitioner a small legacy and some other small sums to which Santayana was entitled.

However, Charles Scribner's Sons arranged for the delivery of the manuscript of "Persons and Places." When it was delivered to Scribner's, the manuscript bore on its cover the following notation, dated July 21, 1942:

> As Messrs. Charles Scribner's Sons are aware, I have authorized my former secretary, Mr. Daniel M. Cory, to sign the contract for the publication of this book, to revise the text, and to receive all royalties that may become due in respect to it.
>
> G. Santayana.

Upon receipt of the manuscript by Scribner's, the petitioner read over the manuscript but made no changes in

it. Thereafter, on November 10, 1942, the petitioner and Charles Scribner's Sons entered into an agreement for the publication of "Persons and Places," which provided in part as follows:

> [273] MEMORANDUM OF AGREEMENT made this tenth day of November 1942
> between DANIEL M. CORY
> of New York City, N. Y., hereinafter called "the Proprietor"
> and CHARLES SCRIBNER'S SONS, of New York City, N. Y., hereinafter called "the Publishers."
> Said—Daniel M. Cory—being the Proprietor of a work tentatively entitled:
>
> PERSONS AND PLACES; Fragments of Autobiography (to be in either two or three volumes)
>
> in consideration of the covenants and stipulations hereinafter contained, and agreed to be performed by the Publishers, grants and guarantees to said Publishers and their successor the exclusive right to publish the said work in all forms in the United States and Canada during the terms of copyright and renewals thereof, hereby covenanting with said Publishers that he is the sole Proprietor of said work.
>
> Said Proprietor hereby authorizes said Publishers to take out the copyright on said work, * * *
>
> Said Publishers, in consideration of the right herein granted and of the guarantees aforesaid, agree to publish said work at their own expense, in such style and manner as they shall deem most expedient, and to pay said Proprietor or his legal representatives, Ten (10) per cent on their Trade-List, retail, price for the first five thousand (5000) copies of said work sold by them, and FIFTEEN (15) per cent of all copies sold thereafter, except as

hereinafter provided. Provided, nevertheless, that one-half the above named royalty shall be paid on all copies sold outside of the United States; and provided that no percentage whatever shall be paid on any copies destroyed by fire or water, or sold at or below cost, or given away for the purpose of aiding the sale of said work.

It is further agreed that the profits arising from any publication of said work, during the period covered by this agreement, in other than book form shall be divided equally between said Publishers and said Proprietor.

[274] The agreement further provided that in the event of certain contingencies the contract should be terminable.

Although the above contract purports to grant to Scribner's the exclusive right to publish "Persons and Places" in all forms in the United States and Canada during the terms of the copyright and renewals thereof, it was not intended by the parties that under the contract Scribner's should have the exclusive serial rights, even for the United States and Canada, and during 1943 the petitioner granted serial rights to three chapters to the Atlantic Monthly for $1,000, none of which was divided with Scribner's.

Other rights retained by petitioner and not granted to Scribner's included the publishing rights in England and English-speaking countries other than the United States and Canada, the right to translate and publish in the language of other countries, and motion picture and dramatic rights. Motion picture and dramatic rights are not normally acquired by a publisher.

On some undisclosed date, but prior to March 18, 1943, Scribner's was warned by George Sturgis, a half-nephew of Santayana, against the paying over of any large sums from the profits from "Persons and Places" to petitioner.

Sturgis held a power of attorney from Santayana to act for him in the United States. Further, Sturgis and his sister were named as residuary legatees in the will Santayana had executed.

As a result of this warning from Sturgis, Scribner's consulted counsel, who advised them that it was doubtful whether Santayana had made an effective gift of the manuscript and its copyright to petitioner. They were further advised not to pay over any of the proceeds of "Persons and Places" with- [275] out the joint consent of Sturgis and the petitioner. As the result of negotiations between the petitioner, Scribner's and Sturgis, the three parties entered into an agreement dated June 21, 1943, providing that Charles Scribner's Sons should pay the royalty proceeds of "Persons and Places" into escrow.

On January 28, 1944, an escrow fund was established with the Chase National Bank of New York City. Charles Scribner's Sons paid $42,363.57 into this fund during 1944. Of this amount $31,300 represented Book-of-the-Month Club proceeds. Under the above contract with Scribner's, the exploitation of "Persons and Places" through the Book-of-the-Month Club was treated as "publication * * * in other than book form" and the profits therefrom were divided equally between Scribner's and petitioner.

The agreement of June 21, 1943, provided that the petitioner should be entitled to payment of a maximum of $12,000 from the escrow fund. From this sum the following amounts were distributed to the petitioner or paid on his behalf during 1944:

$7,500 representing previous advances by Charles Scribner's Sons to the petitioner was paid to Charles Scribner's Sons;
$2,100 was paid to the petitioner; and
$2,400 was paid to the collector of internal revenue for petitioner's account.

Findings of Fact and Opinion

The agreement of June 21, 1943, provided that no payment was to be made to the petitioner without a previous license from the United States Treasury Department, if required, and that Scribner's was authorized by the terms of the agreement to withdraw funds from escrow to pay Federal taxes.

Communication with Santayana was resumed in 1944, though with some [276] difficulty, and on November 4, 1944, Santayana wrote to the petitioner:

> Did you ever get my reply to your letter of June 15? I have been expecting to hear from you again, now that letters can come through the post, and to know whether the affair of the royalties for *Persons & Places*, vol. I, has been settled satisfactorily. George Sturgis now seems to understand what my wishes were, and to withdraw all objections. He had previously sent me a long memorandum drawn up by his legal advisers in which there was a suggestion that rather alarmed me; namely, that in leaving my manuscripts to you by will, just as in giving them to you by hand, *the law does not allow* me [to] convey to you the royalties that may eventually be due on such writings, which come legally still to me or to my residuary legatees. If this is the case, I was leaving or giving you only a keepsake, and no possibility of cash. Is this the law? And how long, if at all, is a publisher expected to pay royalties on a dead man's books? Perhaps the only use you could make of my MSS. would then be to sell them for a lump sum. This matter is important for me, apart from the question of my *Posthumous Poems* and other trifles and unfinished books; because the third volume of *Persons & Places* will certainly remain over, to be published by you eventually. Or *must* the profits for it then go to George Sturgis and his sister, Mrs. Bidwell, who

are my residuary legatees? In that case, I should be compelled to publish it during my lifetime, in spite of moral scruples. Vol. II is ready to be sent, but I have no means of conveyance. If Scribner's can work Mr. Myron Taylor again, let them do so.

Sturgis did not, however, agree to any further withdrawals from the escrow fund for the petitioner's account during 1944. Sturgis died suddenly on December 20, 1944. Thereafter, upon counsel's advice, Scribner's declined to pay any further sums from the escrow fund to the petitioner during 1944. Subsequent to Sturgis' death, the attorney for his estate continued to raise objections to the petitioner's receipt of the escrow funds and wrote to Santayana urging him not to turn over the escrow fund to the petitioner.

On May 21, 1945, Santayana executed a deed of gift, which provided as follows:

[277] KNOW ALL MEN BY THESE PRESENTS

WHEREAS, I, the undersigned GEORGE SANTAYANA, have heretofore given to DANIEL M. CORY the manuscripts later published as "Persons and Places" and "The Middle Span", with all rights and benefits of ownership and all copyrights therein, and

WHEREAS, it has been my intention for many years to give to the said Cory all additional autobiographical manuscripts which I might write,

NOW, THEREFORE, in order to carry out said intention to the fullest extent possible at this time, I have given and I do hereby give, confirm, release and quitclaim to the said Daniel M. Cory, his executors, administrators, and assigns, all my right, title, interest and ownership in and of the said works, "Persons and Places" and "The Middle Span," including all copyright therein throughout

the world, with the intention to vest all such rights irrevocably in the said Daniel M. Cory, his executors, administrators and assigns, and I do hereby give, transfer, set over, assign and convey irrevocably to the said Daniel M. Cory, his executors, administrators, and assigns, all my right, title, interest, and ownership in and of the manuscript of the third volume of my autobiography, which is now completed, including all copyright therein throughout the world, with intent to make the same the sole property of said Cory.

No assignment is included in this instrument of the fourth volume of said autobiography for the reason that said fourth volume remains unwritten, and there is no subject matter of a gift in existence at this time.

On January 1, 1945, the escrow account contained a balance of $30,363.57, which was paid out during 1945 in the following amounts:

Payment to Collector of Internal Revenue for the account of Cory or Santayana as their interests might appear	$12,709.08
Fee for Escrow Services	105.91
Payment to Daniel M. Cory	6,500.00
Payment to Charles Scribner's Sons	1,500.00
Payment to Daniel M. Cory	9,548.58

[278] In his 1944 income tax return, the petitioner reported $42,057.66 as gain from the sale of "Copyright 'Persons & Places' by George Santayana." He listed 1941 as the date the property was acquired by him, and November 10, 1942, as the date of its "sale." The gain was reported as long-term capital gain and $21,028.83 thereof as being the amount subject to tax. The amount of income tax shown by the return was $7,699.06. He reported $16,429.34 as having been paid on account of

such tax, thereby indicating an overpayment of $8,730.28. The $16,429.34 so reported as paid was made up of $2,400 withheld by Scribner's and paid to the collector of internal revenue on petitioner's account, $12,709.08, which had been paid by Scribner's to the collector of internal revenue for "the account of Cory or Santayana as their interests might appear," and $1,320.27, listed as having been paid on petitioner's 1944 declaration of estimated tax. On the basis of the return as filed, a refund of $8,730.28 was made to petitioner in or after 1945.

The respondent, in his determination of the deficiency herein, concluded and determined that the $42,057.66 reported by petitioner as long-term capital gain from the sale of "Persons and Places" was taxable to petitioner as ordinary income.

Prior to November 10, 1942, the date of the contract between petitioner and Scribner's for the publication of "Persons and Places," Santayana had made a gift to petitioner of his entire interest in the work.

OPINION

[279] TURNER, *Judge*: By an amendment to his petition, the petitioner has taken sharp departure from the representations on his return and the allegations in his original petition, to the effect that "Persons and Places" was given to him by Santayana in 1941 and that the $42,057.66 represented the proceeds of the sale by him of a capital asset, and now alleges that Santayana did not "complete the gift" of "Persons and Places" until May 21, 1945,[1] that the income therefrom in 1944 was that of

[1] Although the amended petition alleging that there was no completed gift of "Persons and Places" had been verified by petitioner, it was his testimony at the trial herein that it had been and still was his view that a gift of the said work to him had been completed in 1941.

Santayana, and such part of the "sales" proceeds as was received by him, the petitioner, in that year was received by gift from Santayana, and to him was not income. In the alternative, it is contended that if there had been a gift of the work to petitioner prior to its publication, the transaction with Scribner's was a sale and the gain was capital gain, and for the year 1944 petitioner, at the most, is chargeable with $12,000, the amount he was entitled to draw down under the tripartite agreement.

It is the position of the respondent that there was a completed gift of "Persons and Places" to petitioner prior to the November 10, 1942, contract for its publication, and that the income received by petitioner was ordinary income, his argument being that the transaction with Scribner's was a license, not a sale, of the property, and further, if it be held that [280] the transaction was a sale, it falls within the ambit of *Joseph A. Fields*, 14 T. C. 1202, affd., 189 F. 2d 950, and the "concurring" opinion in *Goldsmith* v. *Commissioner*, 143 F. 2d 466, affirming 1 T. C. 711, in that it was the sale of property held primarily for sale to customers in the course of petitioner's trade or business of exploiting the said "Persons and Places". In the alternative, the respondent argues that the full $42,057.66 realized from the publication of "Persons and Places" by Scribner's represented compensation to petitioner for services rendered by him to George Santayana and, for that reason, is taxable to petitioner as ordinary income in 1944.

While there are some references in the writings or communications of Santayana, and in the testimony of petitioner at the time of the hearing herein which might supply a basis for the conclusion that there was a period of time in which an employer-employee relationship might have existed between Santayana and petitioner, we are convinced that such relationship, if it did exist, was not the basis and did not supply the consideration for the transfer

of "Persons and Places" by Santayana to petitioner. The evidence, in our opinion, shows that Santayana intended to make a gift, and thought he had made a gift, of the work to petitioner, and further, that petitioner likewise so regarded the transaction. It is also clear, we think, that until Sturgis entered the scene and Scribner's received the communication from its attorney, Scribner's also thought an effective transfer of ownership had been made. There was a donor competent to make the gift and a donee capable of taking the gift. And in spite of obstacles which were quite difficult to surmount, there was an effective delivery. Certainly no one would question the acceptance by petitioner. We conclude [281] and hold that prior to November 10, 1942, petitioner, by gift from Santayana, had become the owner of "Persons and Places." *Adolph Weil*, 31 B. T. A. 899, affd. 82 F. 2d 561; *Apt* v. *Commissioner*, 89 F. Supp. 361. It accordingly follows that the income received or realized from or on that work in the taxable year was that of petitioner.

Our next question is whether the income herein was capital gain, or ordinary income. For Federal income tax purposes, capital gain is as prescribed by Congress and results from the sale or exchange of a capital asset, and as defined by section 117(a) of the Code, the term "capital assets" mean "property held by the taxpayer * * * but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Petitioner, by gift from Santayana, had become the owner of the literary work "Persons and Places," and it was his purpose to exploit that property for profit. He was not in the publishing business and did not have the means for having the work published for his own account. The work was subject to copyright, however, and he could sell it, along with his rights under the copyright, for the best price obtainable, or grant a license thereon for such royalties as might accrue.

Findings of Fact and Opinion

The law pertaining to copyrights appears as Title 17 of the United States Code, and secures to the owner of a copyright certain exclusive rights with respect to work copyrighted. These rights, which are set out in detail in section 1 of the statute, are of five classifications or [282] groupings, and for the purposes here, may be stated as (a) the right to print, reprint, publish, copy and sell the copyrighted work; (b) in case of a literary work, the right to translate into other languages or dialects, or to make any other version thereof; and in the case of a non-dramatic work, to dramatize; and (c) the right to utilize the work for lecture purposes, to make or procure the making of transcriptions or records by which and from which, in whole or in part, it may be produced or reproduced, and to plan or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever.[2] The rights under (d) are pertinent, if the work is a drama; and those under (e), if it be a musical composition.

It is, of course, commonplace that the owner of a copyrighted property may grant a license to use or exercise some or all of the rights in and to such property, or he may make a full and complete disposition or sale of the property and his rights with respect thereto. Over the years, numerous cases have been before the various courts wherein the applicability of certain sections of the internal revenue law have turned, in whole or in part, on the question whether the grant of a right or rights in and to a copyrighted work was or was not a sale of the property covered in the transaction. [283] *Rafael Sabatini*, 32 B. T. A. 705, aff'd. in part and rev'd. in part, 98 F. 2d

[2] While it is common knowledge that in recent years a considerable number of motion pictures have been based on the lives of individuals of note, we do not know, from the record, whether the story of Santayana's life would, or would not, attract such interest.

753; *Irving Berlin*, 42 B. T. A. 668; *Estate of Alexander Marton*, 47 B. T. A. 184; *Clifford H. Goldsmith*, 1 T. C. 711, affd., 143 F. 2d 466; *Sax Rohmer*, 5 T. C. 183, affd., 153 F. 2d 61; *Pelham G. Wodehouse*, 8 T. C. 637, reversed 166 F. 2d 986, which was in turn reversed at 337 U. S. 369; *Joseph A. Fields*, 14 T. C. 1202, affd., 189 F. 2d 950; *Herman W. Shumlin*, 16 T. C. 407; *Misbourne Pictures Limited* v. *Johnson*, 189 F. 2d 774, affirming 90 F. Supp. 978; *Paul Reece Rider*, 16 T. C. 1456, affd., 200 F. 2d 524; *Richard W. TeLinde*, 18 T. C. 91; and *Herwig* v. *United States* (Ct. Cls.), 105 F. Supp. 384. Compare *E. Phillips Oppenheim*, 31 B. T. A. 463. In none of the cases prior to *Goldsmith* v. *Commissioner, supra*, and more particularly Judge Hand's "concurring" opinion therein (except as to that part of the decision of this Court in *Rafael Sabatini*, which covered the grant of motion picture rights for a lump sum), have we been able to find any pronouncement or holding that the grant of rights in and to a copyrighted work, even though exclusive, was a sale, where the grant made covered less than all of the owner's rights in and to the said work. Subsequent to the *Goldsmith* case, however, the Court of Appeals for the Fourth Circuit, the Court of Claims, and this Court have in certain cases adopted the views expressed in Judge Hand's opinion. The present position of the Court of Appeals for the Second Circuit, as will appear hereafter, is not to us so clear.

In *Joseph A. Fields, supra*, and *Herwig* v. *United States, supra*, there were grants for lump-sum considerations of exclusive motion picture rights, in the one case to two plays and in the other to a novel. In neither case did the grantor have any further claim against the grantee, or any retained [284] interest in or against the rights so granted, or in the proceeds or profits from the exploitation of the copyrighted work under the said rights, and it was held in both cases that the transaction

was a sale. In the opinions, it was noted that, even though legal title remained in the grantor, it was a naked title and could be exercised for the benefit of the transferee only. The *Fields* case was affirmed by the Court of Appeals for the Second Circuit, as above indicated, but, at the outset, the court observed that "both parties are now agreed that the transaction giving rise to this income was a sale" and devoted its opinion to the consideration of the question whether the property or property rights conveyed had been held by the grantor primarily for sale to customers in the course of his trade or business. Previously, in *Sabatini* v. *Commissioner*, *supra*, the same court had reversed the holding of this Court, to the effect that a grant by Sabatini of exclusive worldwide motion picture rights to certain of his literary works for a lump-sum consideration was a sale, and held that the grant was a license, not a sale. On another issue, it had affirmed the holding that a grant of exclusive publishing rights for the United States to certain of Sabatini's works, with a retained right, such as we have in the instant case, to share in the proceeds from the sale of the published works, was a license, and not a sale. It is to be noted that in the opinion in the *Goldsmith* case, written by Judge Chase, the prior opinion of the court in *Sabatini* was cited as an authority, whereas in the "concurring" opinion of Judge Hand the *Sabatini* case was overlooked or ignored, and in the subsequent opinion of the court in the *Fields* case there was no [285] indication of any thought or intention of modifying or overruling its pronouncements or holdings.

In *Pelham G. Wodehouse*, *supra*, this Court citing *Sax Rohmer*, *supra*, which had followed the holding of the Court of Appeals in the *Sabatini* case, was of the view that a grant by the author of the exclusive right to publish certain of his stories serially in America for a lump-sum consideration was a license, not a sale. The Court of Appeals for the Fourth Circuit, at 166 F. 2d 986, re-

versed that decision and held that the transaction was a sale. The decision of the Court of Appeals was in turn reversed by the Supreme Court, at 337 U. S. 369, as previously noted. The question as decided in the Supreme Court was whether or not the lump-sum payment constituted "fixed or determinable annual or periodical gains, profits and income" from sources within the United States, within the meaning of section 211 of the Internal Revenue Code of 1939. The Court pointed out that under the 1934 Act and the regulations promulgated pursuant thereto royalties had been construed as being such income. It was of the opinion that Congress intended, in section 211, which was enacted in the Revenue Act of 1936, to continue royalties as such income, and held that the lump-sum payments were taxable under that section. In deciding that question, however, it pointed out that if the transaction giving rise to the "royalties" had been a sale, the decision would, under the statute, have been to the contrary, and in the course of its opinion, it cited the opinion of the Court of Appeals for the Second Circuit in the *Sabatini* case with apparent approval.

More recently, the Court of Appeals for the Second Circuit had before it the case of *Misbourne Pictures Limited* v. *Johnson, supra,* on appeal from [286] the United States District Court for the Southern District of New York at 90 F. Supp. 978. In that case, an English corporation had granted to an American corporation the exclusive distribution rights, in all the world except British territory and Australasia, of certain motion pictures produced by the English corporation. The moneys received by the grantee in connection with its distribution of the film were to be divided between the grantor and the grantee on a specified percentage basis. A lump-sum advance payment was made, subject, however, to its recoupment by the grantee from the percentages which should later become payable to the grantor. The question

was as to the nature of the lump-sum advance payment, and in its opinion affirming the District Court, the Court of Appeals stated the question as follows:

> If the transaction was a sale, the tax was illegally exacted; if it was a contract for royalties, as Judge Kaufman held, the judgment was correct.

The court did observe, however, that:

> Perhaps not all of the decisions respecting a transfer of less than all the rights in property of a limited life, such as patents, copyrights or literary property can be consistently reconciled.[1] But it seems unnecessary to discuss them in view of *Commissioner of Internal Revenue* v. *Wodehouse*, 337 U. S. 369, * * * which we regard as decisive of the case at bar.

[287] In the instant case, petitioner in the contract of November 10, 1942, did purportedly grant to Scribner's and their successors "the exclusive right to publish the said work in all forms in the United States and Canada during the terms of copyright and renewals thereof," but both petitioner and Wheelock, Scribner's representative in the transaction, testified that the contract did not and was not intended to cover all of petitioner's publishing rights even for the United States and Canada, in that it was intended and understood that the serial publishing rights were not exclusively granted. And it appears further that petitioner, with full knowledge on the part

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[1] See *Sabatini* v. *Commissioner*, 2 Cir., 98 F. 2d 753; *Goldsmith* v. *Commissioner*, 2 Cir. 143 F. 466, certiorari denied 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619; *Rohmer* v. *Commissioner*, 2 Cir., 153 F. 2d 61, certiorari denied 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632; *General Aniline & Film Corp.* v. *Commissioner*, 2 Cir., 139 F. 2d 759; *Commissioner of Internal Revenue* v. *Celanese Corp.*, 78 U. S. App. D. C. 292, 140 F. 2d 339.

of Scribner's, entered into a transaction in 1943, the year after the contract with Scribner's, for the serial publication by the Atlantic Monthly of three of the chapters of "Persons and Places," from which he realized $1,000, and no part thereof was shared with Scribner's under its contract.

Exclusive of serial rights, however, we still do not think there was a complete or outright disposition by petitioner to Scribner's of his entire remaining interest or interests in the United States and Canadian publishing rights, but rather that the grant was of the right to use or exercise those rights in the United States and Canada for the purpose of exploiting the literary work "Persons and Places" for profit on behalf of both Scribner's and petitioner. It is true that aside from the serial rights as indicated Scribner's was granted the sole and exclusive right to do the publishing and selling of the work in the United States and Canada and to determine the style and manner in which it should be published, but in consideration therefor, it obligated itself to do those things at its own expense and to share with the petitioner the proceeds from the sale of the published copies and [288] the profits from publication in other than book form according to the percentages agreed upon and specified in the contract. No amount was payable in any event and any and all realization by petitioner was dependent entirely upon sales of the printed copies or the existence of profits from publication other than in book form. Stated otherwise, there was no personal obligation or liability ever on the part of Scribner's to pay any sum to petitioner if, after its publishing of the work, it could make no sales and there was an absence of profits from its publication in other than book form. Scribner's could assign its rights under the contract, but such an assignment would necessarily carry with it the obligations to petitioner as well, and there was no provision whereby, as the result of

the payments prescribed or otherwise, petitioner's retained interest or right to participate in the sales proceeds and profits would ever become the property of Scribner's or its assignee. And even though the publishing rights which were granted were exclusive, the interest of petitioner therein continued to be one of substance and not merely a naked title, as in the *Fields* and *Herwig* cases, exercisable only for the benefit of Scribner's. On the facts here, an infringement would adversely affect not the profits of Scribner's alone, but those of petitioner as well, and the fact that an infringement proceeding might be in the name of petitioner or Scribner's would not actually be of any moment.

In our opinion, essential elements of a sale were lacking, and we conclude and hold that the transaction between petitioner and Scribner's for the publication of "Persons and Places" was a license, not a sale.

[289] From the above, it is apparent, we think, that the cases of *Joseph A. Fields, supra,* and *Herwig* v. *United States, supra,* are not this case, and whether or not the views expressed in the opinions therein as to *Commissioner* v. *Wodehouse, supra,* correctly reflect the views of the Supreme Court in that case, *Fields* and *Herwig* are not, in our opinion, controlling here.

Similarly, *Paul Reece Rider, supra,* and *Richard W. TeLinde, supra,* do not indicate or require a conclusion in the instant case contrary to that expressed above, although the consideration for the contract in each of those cases, as in this case, was based upon the sales of the book or books to be published. In the *Rider* case, we found from the evidence that the books in question and the rights under the copyright were held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, and expressly refrained from deciding whether the contract for publication of the books was a sale or a license. In affirming, the Court of Appeals, at

200 F. 2d 524, stated that it did not retry issues presented to the Tax Court, but limited its decision to the issue decided below. In *Richard W. TeLinde*, we concluded and held that where the fair intendment of the contract as a whole was the disposition or sale by the taxpayer of all of his rights in the property, the "mere payment of a consideration on the basis of sales" was not alone sufficient "to transmute what would otherwise be a sale into a mere license." In the instant case, and for the reasons above, we have concluded from a consideration of the transaction as a whole that a license, and not a sale, was effected. We accordingly do not reach the attendant question in *TeLinde*, where the gearing of the amount of the consideration to sales remained as the [290] sole basis for concluding that the transaction was a license and not a sale.

Having concluded that the transaction between petitioner and Scribner's for the publication of the literary work "Persons and Places" was a license, not a sale, it follows that the amounts received and realized by petitioner during the taxable year from such publication constituted ordinary income, and not capital gains, and we so hold.

In passing, it may be noted that in the current tax year and hereafter, questions comparable to that herein will not arise either with respect to cases involving copyrights or cases involving patents, since Congress, by amendment to the Internal Revenue Code, in the Revenue Act of 1950, has specifically dealt with the nature of copyrights as capital assets, and has also legislated specifically with respect to patents in the Internal Revenue Code of 1954. Section 117 (a)(1)(C) of the Internal Revenue Code of 1939, as amended, and sections 1221 (3) and 1235 of the Internal Revenue Code of 1954.

The remaining issue is as to the amount of income received by petitioner under the contract with Scribner's

in 1944. Petitioner's right to the royalties payable by Scribner's in connection with the publication of "Persons and Places" was at all times during 1944 in dispute and undetermined. Pursuant to the tripartite agreement, however, he did have the right to receive, and did receive, the sum of $12,000 therefrom. His rights to the remainder were not resolved until 1945. Such being the case, we conclude and hold that of the royalties paid by Scribner's under the contract of November 10, 1942, only $12,000 was income to petitioner in 1944. *Foster Wheeler Corporation*, [291] 20 T. C. 15. *Bonham* v. *Commissioner*, 89 F. 2d 725, affirming 33 B. T. A. 1100, and *Heiner* v. *Gwinner*, 114 F. 2d 723, on which respondent relies, are not in point.

Reviewed by the Court.

Decision will be entered under Rule 50.

Order and Decision

[208]

[SAME TITLE]

For cause appearing of record, it is

ORDERED: That the decision entered herein May 20, 1955, be and hereby is vacated; and it is further

ORDERED and DECIDED: That there is an overpayment of income tax for the year 1944 in the amount of $4,559.40, which amount was paid within three years before the execution of an agreement by the parties pursuant to Section 276 (b) of the Internal Revenue Code of 1939 to extend beyond the time prescribed in Section 275 the time within which the tax might be assessed, the agreement having been executed within three years after the filing of the return for said year.

Enter:

(Signed) BOLON B. TURNER
Judge

Entered Jun 17 1955

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 195—October Term, 1955.

(Argued February 14, 1956 Decided March 9, 1956.)

Docket No. 23790

DANIEL M. CORY and MARGOT CORY, his wife,

Petitioners-on-Review,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-on-Review.

Before

CLARK, *Chief Judge*,

FRANK and HINCKS, *Circuit Judges*.

Petition to review a decision of the Tax Court of the United States. Affirmed.

WASHBURN, GRAY & JONES (New York, New York), Attorneys for Petitioners-on-Review.

H. BRIAN HOLLAND, Assistant Attorney General, LEE A. JACKSON, Attorney, MORTON K. ROTHSCHILD, Attorney, Attorneys for Respondent-on-Review.

Opinion

Taxpayers, husband and wife, who are citizens of the United States, seeks review of a decision of the Tax Court which found a deficiency in income tax against them for the taxable year 1944 in the amount of $13,770.50. The facts are fully set out in the opinion of the Tax Court, reported at 23 T. C. 775. Summarized, the Court's findings are as follows:

Before November 10, 1952, George Santayana, the noted poet-philosopher, made a gift of his entire interest in his autobiography, "Persons and Places," to taxpayer Daniel M. Cory, who had long been his friend, disciple and secretary. Although Cory himself had written many essays on philosophy and epistemology, they had been published primarily in scholarly periodicals which customarily do not compensate the author for the right to publish his works. So Cory's earnings from his writings have been insignificant in amount.

On November 10, 1942, Cory and Charles Scribner's Sons, publishers, entered into an agreement for the publication of "Persons and Places." It provided that Cory designated as the "Proprietor," "* * * grants and guarantees to said Publishers and their successors, the exclusive right to publish such work in all forms in the United States and Canada during the terms of copyright and renewals thereof * * *" The publishers were authorized to take out the copyright. In return, the publishers agreed to "publish said work at their own expense" and to pay Cory 10% of the retail price for the first 5000 copies sold in the United States and 15% on all further copies. The royalty on foreign sales was to be one-half of the above percentages. It was further agreed that "the profits arising from any publication of said work, during the period covered by this agreement, in other than book form, shall be divided equally between said Publishers and said Proprietor."

The agreement did not grant Scribner's the publishing

rights in England or other English-speaking countries other than the United States and Canada, the right to translate and publish in the language of other countries, or the motion picture and dramatic rights. Motion picture and dramatic rights are not normally acquired by a publisher.

In 1936, Cory sold the serial rights to three chapters to the Atlantic Monthly for $1,000, none of which he divided with Scribner's. From this and other evidence, the Tax Court concluded that the first serial rights were not transferred to Scribner's.

Because of a misunderstanding with George Sturgis, a half-nephew of Santayana, the amounts due Cory under the agreement were put in a special escrow fund established by agreement of the parties in January, 1944. In that year, Scribner's paid $42,363.37 into the fund, $31,300 of which represented Book-of-the-Month Club proceeds. Under the contract, these Book-of-the-Month Club payments were treated as "profits arising from any publication * * * in other than book form," and were divided equally between Scribner's and Cory. The money remaining in the escrow fund was paid to Cory after the misunderstanding with Santayana's nephew had been cleared up.

In their 1944 joint return, petitioners reported $42,057.66 as gain from the sale of "Copyright, 'Persons & Places' by George Santayana." They listed 1941 as the year of acquisition of the property and November 10, 1942 as the date of the "sale." The gain was reported as long term capital gain, and $21,028.83 thereof as being the amount subject to tax. The amount of income tax shown by the return was $7,699.06. Since $16,429.34 was reported as having been paid on account of such tax, the return showed an overpayment of $8,730.28. On the basis of this return, a refund of $8,730.28 was made to Cory in or after 1945.

Opinion

The Commissioner determined a deficiency of $13,770.50 after concluding and determining that the $42,057.66, reported by petitioners as long term capital gain from the sale of "Persons & Places," was taxable as ordinary income. The Tax Court upheld the Commissioner's determinations, and petitioners seek review of its decision.

FRANK, *Circuit Judge:*

1. The sole issue is whether the amount of income reported in 1944, as derived from Santayana's "Persons and Places," constituted ordinary income or a long term capital gain. In answering, we must decide whether the transaction between Cory and Scribner's constituted a "sale" or merely the granting of a license.

The Tax Court held that Cory gave Scribner's a license. That Court based its decision, in part, on the fact that a part only of the "bundle of rights" inhering in the copyright were transferred to Scribner's, since Cory assigned neither foreign publishing rights (other than Canadian) nor movie or dramatic rights. Furthermore, the Tax Court found that Cory had not transferred the first serial rights even for the United States and Canada. In addition, the Tax Court held there was no "sale" because no definite price was fixed for the transfer: Payments to Cory were to be measured by future sales of the book. The evidence supports the Tax Court's findings which are, therefore, not "clearly erroneous."

The Tax Court thought the previous pertinent decisions not too clear. This difficulty, and its bearing on Cory, would have interested Santayana, with his sense of irony, his detachment, his mockery of "the runner's heat with gentle wonder and laughter sweet," his emphasis on

human limitations and individual human perspectives,[1] his view that human knowledge "is a torch of smoky pine that lights the pathway but one step ahead," his jibes at the common belief that opaque language must denote "profound knowledge," his smile at efforts to "grope for a deep truth in * * * obscurity."[2]

To grope our way through obscurity, in this area, we must put to one side, as irrelevant here, cases dealing with the taxation of transfers of interests in copyrights

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[1] He wrote that, "since the station, faculties, and passions of all men are not identical," their "pictures" of events "will not be identical * * * The same battle in the clouds will be known to the deaf only as lightning and to the blind only as thunder * * *"

[2] These readers of his Autobiography who receive an impression of Santayana as self-absorbed to the point of excessive selfishness, will be surprised by his letter of August 22, 1941, to Wheelock, Scribner's representative, which reads as follows:

> "In your kind letter of July 30 you say your firm is disposed to advance the payment of my royalties to Cory, if he should ever need such assistance. I am very glad to know this; because I feel partly responsible for having kept him out of steady employment during the best years of his life. * * * It happens to be difficult for me for family reasons to leave Cory any legacy or to help him out of the money in charge of my nephew George Sturgis, which is largely Sturgis money in origin. But I feel free to dispose of my earnings, including my royalties; and for this reason (as I don't need them) I have asked you to let him have them during this war, when my private bank account in London is congealed. In case of my death, however, he might be in at least monetary difficulties; and I am not sure that my royalties could then legally go to him. For this reason I mean to give him my MSS including that of my autobiography, and am expressly leaving them to him in my Will. He will then make the contract for publication with you, and have a right to the royalties."

(or patents) by non-resident aliens:[3] The decisions in those cases interpreted Sections 211 and 212 of the 1939 Internal Revenue Code, and similar provisions in the prior acts, which embodied the Congressional purpose to tax "those kinds of income" of such aliens "which had been found to be readily withholdable at their * * * sources," as the Supreme Court remarked in *Commissioner* v. *Wodehouse*, 337 U. S. 369, 388-392. Quite different is the Congressional purpose embodied in Section 117 covering capital gains, since that section does not apply to non-resident aliens, but solely to citizens of the United States. Accordingly, as we have previously several times observed,[4] other considerations must guide our determination whether the profit resulting from a transfer by a citizen of interests in copyrights is a capital gain or ordinary income.

In *Commissioner* v. *Wodehouse*, *supra*, the Supreme Court apparently accepted the contention that it did "not properly reach the fine questions of title, or of sales or copyright law, * * * as to the divisibility of a copyright, or as to the sale of some interest in a copyright." But here we must consider such "fine questions."

In *Goldsmith* v. *Commissioner*, 143 F. 2nd 466, 467 (C. A. 2), a case involving a citizen taxpayer, Judge

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[3] *Rafael Sabatini*, 32 B. T. A. 705, affd., 98 F. 2nd 753 (C. A. 2); *Estate of Alexander Marton*, 47 B. T. A. 184; *Sax Rohmer*, 5 T. C. 183, affd., 153 F. 2nd 61 (C. A. 2); *Pelham C. Wodehouse*, 8 T. C. 637, reversed, 166 F. 2nd 986 (C. A. 4), reversed, 337 U. S. 369; *Misbourne Pictures Ltd.* v. *Johnson*, 189 F. 2nd 774 (C. A. 2), affirming 90 F. Supp. 978; *E. Phillips Oppenheim*, 31 B. T. A. 563; *Bloch* v. *United States*, 200 F. 2nd 63 (C. A. 2).

[4] See e.g. *Rohmer* v. *Commissioner*, 153 F. 2nd 61, 65 (C. A. 2); *Bloch* v. *United States*, 200 F. 2nd 63, 66 (C. A. 2). In *Goldsmith* v. *Commissioner*, 143 F. 2nd 466, 467 (C. A. 2), the majority opinion ignored *Sabatini* v. *Commissioner*, 98 F. 2nd 753 (C. A. 2) which related to a non-resident alien. See also *Herwig* v. *U. S.*, 105 F. Supp. 384, 387 (Ct. of Claims).

Learned Hand, speaking for the majority held that the transfer of part of the bundle of rights (making up the copyright) for a definite sum, yielded a sale. However, he concluded that the vendor, a professional author, held the interests in the copyright "for sale to customers in the ordinary course" of his business, and were hence excluded from the definition of a capital asset in Section 117(a)(1)(A).

Mr. Justice Frankfurter, dissenting in *Wodehouse*, and speaking for two other Justices, approved Judge Hand's ruling in *Goldsmith*. He maintained that the crucial test of sale was not whether the transfer included the entire bundle of rights but whether there had been a transfer "absolutely" of a "distinct right * * * conferred by the Copyright Law" under "terms of payment which do not depend on the future use by the transferee." See 337 U. S. at 423-424. The majority of the court in *Wodehouse* rested its decision on the interpretation of the peculiar provisions of the Code relating to non-resident alien individuals. Accordingly, the majority did not express any lack of agreement with Mr. Justice Frankfurter's rejection of the theory of the "indivisability of the copyright." See also *Herwig* v. *United States*, 105 F. Supp. 384 (Ct. Cl.); Fulda, Copyright Assignments and the Capital Gains Tax, 58 Yale L. J. 245 (1949); cf. *Field* v. *Commissioner*, 189 F. 2nd 950 (C. A. 2).

If we adopt the reasoning of Judge Hand and Mr. Justice Frankfurter, it follows that the mere fact that Cory transferred less than his entire bundle of rights does not automatically brand this transaction as but a license.

However, it does not necessarily follow that, therefore, the transaction was a sale. For here the transaction lacked an element implicity considered in Judge Hand's opinion in *Goldsmith*, *supra*, and explicitly stressed by Mr. Justice Frankfurter in *Wodehouse:* At the time of the transfer,

the amount of payment to the transferor remained indeterminate, dependent wholly on the sales of the book by the transferee.

We do not now decide that a transfer by a citizen of but a part of the bundle for a definite sum, or a transfer of the whole for an indeterminate sum, is a sale for purposes of Section 117.[5] We do hold that when, as here, the transfer is both (1) a transfer of a part of the cluster of rights and (2) for an amount wholly indeterminable at the time of the transfer, no such sale occurs.

Affirmed.

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[5] The taxpayers cite *Commissioner* v. *Hopkinson*, 126 F. 2nd 406 (C. A. 2) and *TeLinde*, 18 T. C. 91 as authority for their contention that the transfer of a copyright interest for a price to be fixed by the future profits can constitute a sale. In *Hopkinson*, this court held that the transfer of a patent was a sale, despite the fact that payment turned on future sales. In *TeLinde*, the Tax Court held similarly in dealing with the transfer of a copyright. However, in both cases the taxpayers transferred the entire bundle, so that they no longer retained any interest in them. They had only the right to receive periodic payments of money.

Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges

DANIEL M. CORY and another,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

DANIEL M. CORY and ano.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FILED MAR 9, 1956

A. DANIEL FUSARO, CLERK

Clerk's Certificate

UNITED STATES OF AMERICA

Southern District of New York

I, A. Daniel Fusaro, Clerk of the United States Court of ppeals for the Second Circuit, do hereby certify that ne foregoing pages numbered from 1a to 45a, inclusive, ontain a true and complete transcript of printed portions f the record and proceedings had in said Court, in the ase of

Daniel M. Cory and Margot Cory, his wife,

Petitioners,

against

Commissioner of Internal Revenue,

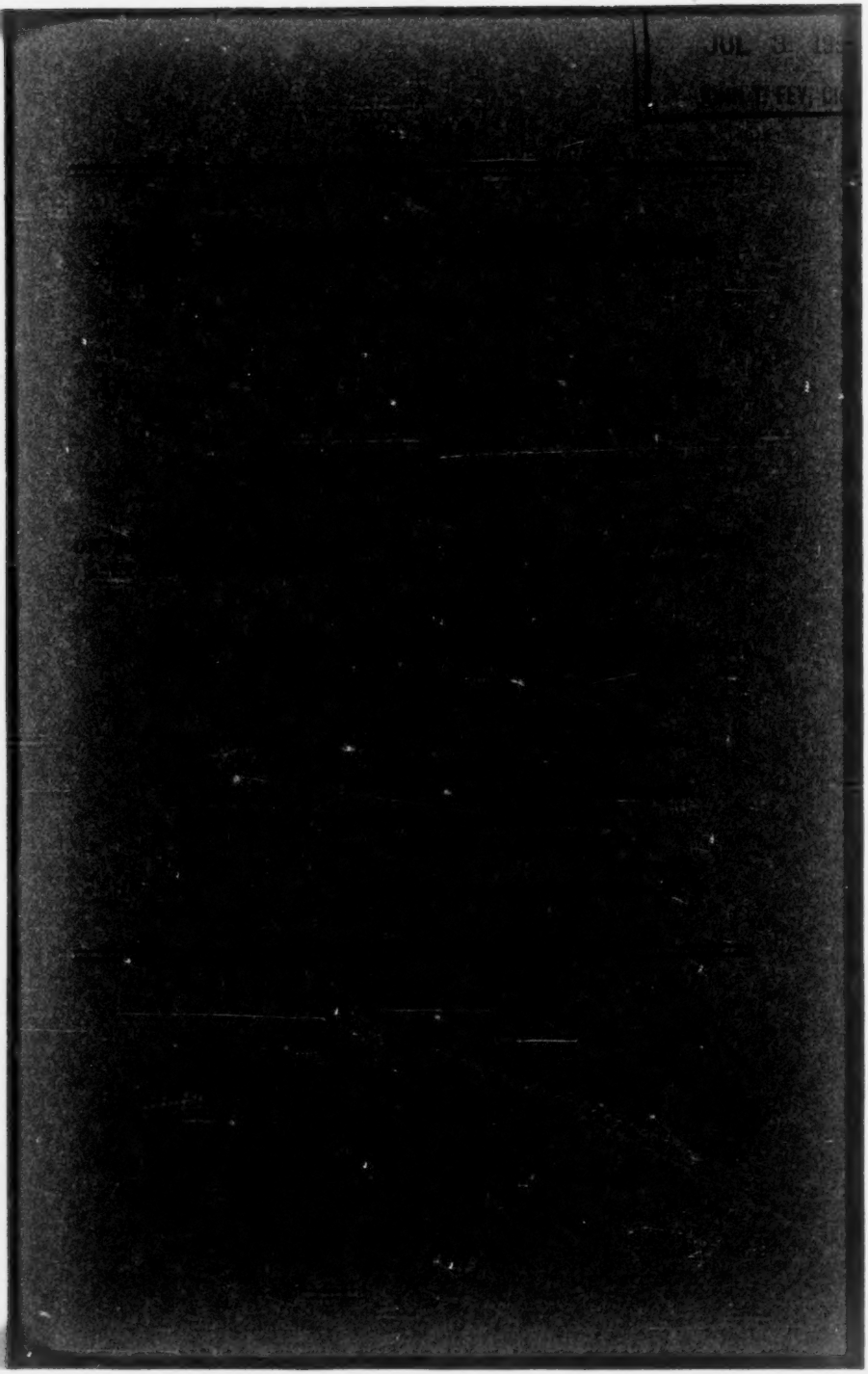
Respondent,

s the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the aid Court to be hereunto affixed, at the City of New York, n the Southern District of New York, in the Second Circuit, this 23rd day of May in the year of our Lord one thousand nine hundred and fifty-six, and of the Inde- pendence of the said United States the one hundred and eightieth.

A. Daniel Fusaro
Clerk.

(Seal)



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 143

DANIEL M. CORY AND MARGOT CORY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 11a–34a) is reported in 23 T. C. 775. The opinion of the Court of Appeals (R. 37a–44a) appears at 230 F. 2d 941.

JURISDICTION

The judgment of the Court of Appeals (R. 45a–46a) was entered on March 9, 1956. The petition for a writ of certiorari was filed on June 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Taxpayer Daniel M. Cory was given a manuscript written by George Santayana. He thereupon en-

tered into a contract with Scribner's for publishing the book, and he received royalties on the copies sold. The question presented is whether the arrangements between the contracting parties constituted the granting of a license, in which event the royalties were taxable as ordinary income, or constituted a sale, in which event they were taxable as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 22.)
>
> SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) *Definitions.*—As used in this chapter—
>
> (1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close

of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l);

* * * * *

(b) [As amended by Sec. 150 (c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income;

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months;

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

STATEMENT

The facts as found by the Tax Court (R. 12a–23a) may be summarized as follows:

The taxpayers, husband and wife, are citizens of the United States; they filed a joint income-tax return for the calendar year 1944. (R. 12a.) Prior to November 10, 1942, George Santayana, the well-known philosopher and author, made a gift of his entire interest in his autobiography, *Persons and Places,* to Daniel M. Cory (hereinafter referred to as the taxpayer), who had long been his friend, disciple, and

secretary. (R. 12a, 23a.) Although the taxpayer himself had written many essays on philosophy and epistemology, these had been published primarily in scholarly periodicals which customarily do not compensate their contributors. Accordingly, the taxpayer's earnings from his writings have been insignificant in amount. (R. 12a–13a.)

On November 10, 1942, the taxpayer and Charles Scribner's Sons, publishers, entered into an agreement for the publication of *Persons and Places*. It provided that the taxpayer, designated as the Proprietor, "grants and guarantees to said Publishers and their successor the exclusive right to publish the said work in all forms in the United States and Canada during the terms of copyright and renewals thereof." The publishers were authorized to take out the copyright, and agreed on their part to "publish said work at their own expense" and to pay the taxpayer ten per cent of the retail price for the first 5,000 copies sold in the United States and fifteen per cent of all copies sold thereafter, with certain exceptions. (R. 17a–18a.) The royalty on foreign sales was to be one half of the above percentages. It was further agreed that "the profits arising from any publication of said work, during the period covered by this agreement, in other than book form shall be divided equally between said Publishers and said Proprietor." (R. 18a.)

The agreement did not grant Scribner's the publishing rights in England or in English-speaking countries other than the United States and Canada, or the right to translate and publish the work in foreign

languages, or the motion-picture and dramatic rights. Motion-picture and dramatic rights are not normally acquired by a publisher. (R. 18a.)

In 1943, the taxpayer sold the serial rights to three chapters to the *Atlantic Monthly* for $1,000. Scribner's did not receive any portion of this sum. (R. 18a.) From this and other evidence the Tax Court concluded that the serial rights were not transferred to Scribner's. (R. 30a–31a.)

Because of a misunderstanding with George Sturgis, a half-nephew of Santayana, the amounts due the taxpayer under the agreement were put in a special escrow fund established by agreement of the parties in January, 1944. In that year, Scribner's paid about $42,000 into the fund, about $31,000 of which represented Book-of-the-Month-Club proceeds. (R. 18a–19a.) Under the contract, these Book-of-the-Month-Club payments were treated as profits arising from any "publication * * * in other than book form," and were divided equally between Scribner's and the taxpayer. (R. 19a.) The money remaining in the escrow fund was paid to the taxpayer during 1945. (R. 21a–22a.)

In their 1944 joint return, the taxpayer and his wife reported $42,057.66 as gain from the sale of "Copyright 'Persons & Places' by George Santayana." They listed 1941 as the date of the acquisition of the property and November 10, 1942, as the date of its "sale." The gain was reported as long-term capital gain and $21,028.83 thereof as being the amount subject to tax. The amount of income tax shown by the return was $7,699.06. (R. 22a.) Since $16,429.34

was reported as having been paid on account of such tax, the return showed an overpayment of $8,730.28. On the basis of the return a refund of $8,730.28 was made to the taxpayer in or about 1945. (R. 22a–23a.)

The Commissioner, finding a deficiency, determined that the $42,057.66 reported by the taxpayer as long-term capital gain from the sale of *Persons and Places* was taxable as ordinary income. (R. 23a.) The Tax Court decided, however, that only $12,000 of the royalties in the escrow fund were received by the taxpayer during the year 1944 (R. 34a), and the Commissioner did not appeal from that part of the Tax Court's decision. The Tax Court also decided that the transaction between the taxpayer and Scribner's was the granting of a license, and not a sale, and that, therefore, the amount received during the taxable year was ordinary income and not capital gain. (R. 33a.) The taxpayers appealed to the Court of Appeals for the Second Circuit, which affirmed the decision of the Tax Court. (R. 37a–44a.)

ARGUMENT

There is a difference of opinion among the courts as to whether a transfer of less than the entire bundle of rights in a copyright is a sale within the meaning of Section 117 (b) of the Internal Revenue Code of 1939, *supra*, page 3, relating to capital gains.[1] And, concededly, it is difficult to reconcile all of the court

[1] See, for instance, *Rohmer* v. *Commissioner*, 153 F. 2d 61 (C. A. 2d), certiorari denied, 328 U. S. 862; *Wodehouse* v. *Commissioner*, 166 F. 2d 986 (C. A. 4th), reversed, 337 U. S. 369, rehearing denied, 338 U. S. 840; *Goldsmith* v. *Commissioner*, 143 F. 2d 466 (C. A. 2d), certiorari denied, 323 U. S. 774.

decisions dealing with the question whether a transfer of patents (which are analogous to copyrights) is a sale for capital-gain purposes where the consideration for the transfer is indeterminable at the time of the transfer.[2] The Court of Appeals, however, took pains to avoid declaring a general rule covering either of the above-mentioned situations. It limited its decision to the facts of this case, where it appeared both that there was a transfer of less than the entire bundle of rights in the copyright *and* that the consideration for the transfer was wholly indeterminable at the time of transfer. (R. 44a.)

The taxpayer did not transfer to Scribner's the serial rights, the right to publish the book in countries other than the United States and Canada, the right to translate into the language of other countries, or the motion-picture and dramatic rights. (R. 18a.) In addition, the consideration was dependent entirely upon future sales. (R. 17a–18a.) The Court of Appeals stated in its opinion (R. 44a):

> We do hold that when, as here, the transfer is both (1) a transfer of a part of the cluster of rights and (2) for an amount wholly indeterminable at the time of the transfer, no such sale occurs.

So far as we have been able to ascertain, there is no decided case substantially similar to the present one. In *Herwig* v. *United States,* 105 F. Supp. 384 (C. Cls.) (Pet. 9), the consideration for the transfer

[2] Compare *Allen* v. *Werner*, 190 F. 2d 840 (C. A. 5th), with *Bloch* v. *United States*, 200 F. 2d 63 (C. A. 2d), certiorari denied, 345 U. S. 935, *Broderick* v. *Neale*, 201 F. 2d 621 (C. A. 10th), and *Switzer* v. *Commissioner*, 226 F. 2d 329 (C. A. 6th).

was determinable, at least in part, at the time of transfer, as the taxpayer apparently concedes. The amount of the consideration there was at least $125,000 in cash, plus additional payments not to exceed $75,000 (p. 385), whereas in the instant case the consideration for the transfer was wholly indeterminable at the time of transfer; it depended entirely upon the future sales of the book. (R. 17a–18a.) *Fields* v. *Commissioner,* 189 F. 2d 950 (C. A. 2d) (Pet. 9), also differs from this case because there, again, the consideration was fixed at $40,500 for the rights to one motion picture and at $22,500 for the rights to another. See *Fields* v. *Commissioner,* 14 T. C. 1202, 1207. Moreover, in *Fields* the only question was whether the property was used in the trade or business within the meaning of Section 117 (j) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 117 (j)), so that the case differs materially from the present one.

The taxpayer alleges that the decision of the court below is in conflict with eight decisions of the Courts of Appeals "in the closely analogous case of transfer of patent rights on a royalty basis." (Pet. 9.) Since there is no allegation of a direct conflict between the decision in this case and those decisions, full discussion of the latter would not seem to be necessary. Of the eight cases, the following involve a transfer of the entire bundle of rights, as contrasted with this case which involves a transfer of less than the entire bundle: *Commissioner* v. *Hopkinson,* 126 F. 2d 406 (C. A. 2d); *Commissioner* v. *Celanese Corp.,* 140 F. 2d 339 (C. A. D. C.); *Hofferbert* v. *Briggs,* 178 F.

2d 743 (C. A. 4th); *Watson* v. *United States,* 222 F. 2d 689 (C. A. 10th); *Massey* v. *United States,* 226 F. 2d 724 (C. A. 7th).

In *United States* v. *Carruthers,* 219 F. 2d 21 (C. A. 9th), the patent in question related to processing of tuna fish and, since no attempt was made to use it outside of the tuna industry, the transfer was in substance one of the entire bundle of rights. In *Kavanagh* v. *Evans,* 188 F. 2d 234 (C. A. 6th), the consideration for the transfer was a fixed amount, whereas in the present case it was wholly indeterminable at the time of the transfer. In *Allen* v. *Werner,* 190 F. 2d 840 (C. A. 5th), there was a guaranteed annual minimum royalty of $5,000, whereas there was no minimum royalty in the present case.

In sum, we believe that there is no conflict and that the decision below reaches a sound result in concluding that a transfer of a portion of the rights conferred by copyright, when accompanied by a lack of determinable compensation, has the essential attributes of "license" rather than "sale." We point out additionally that this case is of limited importance because under the Revenue Act of 1950 and the Internal Revenue Code of 1954 copyrights are excluded from the definition of capital assets.[3]

CONCLUSION

The decision of the courts below is correct. The case is not of general importance and there is no di-

[3] See Section 210 (a) of the Revenue Act of 1950, c. 994, 64 Stat. 906 (26 U. S. C. 1952 ed., Sec. 117), and Section 1221 (3) of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. II, Sec. 1221).

rect conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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